Petition

81-595

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
October 1981 Term

AVABELLE BASKETT, et al.,
Petitioners.

PETITION FOR A WRIT OF MANDAMUS
TO THE
UNITED STATES COURT OF CLAIMS
AND THE HONORABLE THOMAS J. LYDON
STATUTORY COMMISSIONER

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

IN RE:

AVABELLE BASKETT, et al

PETITIONERS

PETITION FOR A WRIT OF MANDAMUS

TO THE UNITED STATES COURT OF CLAIMS
AND THE HONORABLE THOMAS J. LYDON
STATUTORY COMMISSIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Claims under Rule 131(B) delegating, as a matter of course, authority to an Article I Commissioner to Find only Selected Facts supportive of his Recommended Opinion in derogation of 28 U.S.C. 2503(b)?

2. Does the Court of Claims routine adherence to the Appelate Procedure [Rule 13(d)] and of presumption that the Trial (Judge) Commissioner's Recommended Findings are correct

[Rule 147(b)] deny Petitioners the Due Process right to full consideration of all the evidence by Article III Judges, all in derogation of 28 U.S.C. § 2503(b)?

3. Does the filing of an exception to a Commissioner's report of a fact and/or recommendation for conclusion of law, mandate "a hearing thereon before the Court within a reasonable time", and mandate a specific ruling on each such exception?

B. ADDITIONAL PETITIONERS

MARY STEPHENSON BUETCHER, GILBERT CANNON and SHARON CANNON, BAYWARD J. COLE and MARY ANN COLE, DOROTHY COLE, HAZEL EDGERTON, GEORGE E. EGGER, WARREN FISHER, MARGRETE NIELSEN HERON, MACKEY KNEAR and MARY JANE KNEAR, ED KNEAR and LILLIAN KNEAR, DOROTHY A STEPHENSEN KRUTZ, BRUCE K. LORCH, HOWARD B. MARRS, CLARENCE PANNETT, WILLIAM D. SCHRADER and CAROLINE SCHRADER, EMMETT TERRY

and MILDRED TERRY, DAVID ALLEN and EVA ALLEN, EARL C. BARKS, RICHARD E. BLAKE, MARVIN E. BRUINGTON, JESSE E. BULLOCK, JR., CITY OF WEST POINT, KENTUCKY, HARRY H. CLINE, JR. and ROSEMARY CLINE, HARRY H. CLINE ESTATE, MINNIE CLINE, EXECUTRIX, ELMER COOPER, ESTELLE M. CROWE, JOHN W. CROWE, JR., and KATHLEEN K. CROWE, HAROLD CUNNINGHAM and JULIA CUNNINGHAM, HARRY R. DeVORE, JR., ROBERT FRIED, WILLIAM GERDON, EDWARD A. GOSS and HELENE L. GOSS, FRANCIS P. HAGMAN, EDWIN A. HART, EDITH S. HAYNES, LOUIS N. HERMER and PHYLLIS M. HERMER, WALTER HOLLIS and RUTH HOLLIS, ELMER LEE JONES, NETTIE G. KING, M.D., CHESTER KLINESTIVER, EARL MANGIN, CARK E. MARSHALL, FRANCES MATHIS, RAIBORN D. McGEE and KATHY S. McGEE, RAYMOND A. MYERS and LORETTA MYERS, JOSEPH A. NELSON, GEORGE L. NIENABER and CHARMAINE NIENABER, MICHAEL E. POPHAM, N.A. POPHAM, LORENDA

S. RICHARDSON, JOHN H. ROLSEN and LORETTA ROLSEN, HENRY L. RUDD and HELEN JEAN RUDD, ORA C. SHACKLETTE, ALVIN E. SHEARN, CHARLLOTTE SIMONSON, SOUTHERN INDIANA RURAL ELECTRIC COOP., INC., CARL E. STAUTH, JOHN B. TAYLOR, JR., and SALLY C. TAYLOR, JOHN B. TAYLOR, SR., and NANCY KEITH TAYLOR, TAYLOR PROPERTIES, INC., HERMAN T. WILLIAMS, MARTIN WINKLER and DOROTHY WINKLER, C.H. WITHERS and JULIA K. WITHERS, DONALD ALLEN, JOHN B. BELL and NANCY B. BELL, JOHN CAMPBELL, MALCOLM CARRACO, RICHARD CHAMBLEE and JOAN CHAMBLEE, CLARA E. ELDER, HENDRY ACRES, INC., ARTHUR KRUGER, CHARLES LUTGRING, PAYL LUTGRING, WALLACE MANGIN, GILBERT MOORE and HELEN MOORE, BENJAMIN I. PERCHIK and HELEN PERCHIK, PIKE HEIRS, HOBERT RAYBURN and HELEN H. RAYBURN, BEN A. REID, M.D., RIVER RIDGE PARK, INC., G.K. SMART, ROY C. SONNER, BOONE COUNTY, STATE OF KENTUCKY, H. JOEL

DECKARD, U. S. CONGRESSMAN

CHARLES E. KELLER, JR., BRIG. GEN

THURMAN OWENS, USMC (RET) and PHYLLIS

M. OWENS, CITY OF COVINGTON, KENTUCKY,

DAVID A. ALEXANDER, GARY B. JOHNSON

and DIANA M. JOHNSON

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E. JURISDICTIONAL STATEMENT

This Petition is filed pursuant to 28 U.S.C. § 1651(a) and seeks a Mandate to the U.S. Court of Claims to conform its practice to Rules not violative of Due Process as to Constitutionally Guaranteed Rights; and Rules not in derogation of Congressional Enactment, to wit:

28 U.S.C. § 2503(b).

F. THE CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCES AND REGULATIONS

Court of Claims Rule 13(b), 13(d)

Court of Claims Rule 147(b)

House Doc. 306, 1st Sess., 74th Congress 1935

28 U.S.C. § 636(b)(1)(C)

28 U.S.C. § 1651(a)

28 U.S.C. § 2503(b)

United States Constitution Article I

United States Constitution Article III

1911-14 Survey of the Ohio River

See Appendix F through M

G. STATEMENT OF THE CASE

On or about *July 31, 1981* these cases were consolidated and assigned to Statutory Commissioner Thomas J. Lydon who is the same Article I Commissioner who, in the *Loesch* cases had been delegated, exercised full authority and recommended selected Findings of Fact, ignoring multiple material facts requested and objections filed, ignoring empherical evidence, ignoring physical laws of nature, ignoring the well-established line of Supreme Court cases and ignoring recent decisions of the United States Court of Claims.

On or about *August 3, 1981* Commissioner Thomas J. Lydon issued a Standard Pre-Trial Order and advised counsel he would be proceeding as in the *Loesch*

cases. Counsel will file herein a Petition for Writ of Certiorari in *Loesch* cases.

The bulk of the *Loesch* record is filed with this Court.

Counsel is compelled to seek a mandate to avoid repetitious conduct which appears routinely established by unconstitutional Rules of the United States Court of Claims.

H. THIS IS NOT A STATE COURT ACTION

I. JURISDICTION AUTHORITY of Federal Court in the first instance is the Tucker Act, 28 U.S.C. § 1491 and 28 U.S.C. § 1845 et seg.

J. ARGUMENT

1. On *April 14, 1978* a Complaint entitled *Avabelle Baskett, et al. v. The United States* was filed in the United States Court of Claims, Cause No. 161-78, alleging, under the Tucker Act, an uncompensated Fifth Amendment taking by raising the waters of the Ohio River, increasing the Cubic Feet Per Second Flow,

involving construction of a series of dams including flood control reservoirs on tributaries in fourteen (14) States. The Complaint is set forth as Appendix A.

2. On *July 15, 1978* a Complaint entitled *David Allen and Eva Allen, et al. v. The United States* was filed in the United States Court of Claims, Cause No. 340-78, alleging the same.

3. On *July 18, 1979* a Complaint entitled *Donald Allen, et al. v. The United States* was filed in the United States Court of Claims, Cause No. 317-79L, alleging the same.

4. On *June 17, 1980* a Complaint entitled *Boone County, State of Kentucky, et al. v. The United States,* was filed in The United States Court of Claims, Cause No. 311-80L, alleging the same.

5. On *November 17, 1980* a Complaint entitled *City of Covington, Kentucky, et al v. The United States,* was filed in the United States Court of Claims, Cause No.

616-80L, alleging the same.

6. On *July 31, 1981* all of the above were ordered consolidated for trial, estimated to take four (4) months and to entail a transcript copy cost of $20,000.00. A copy of the Order is Appendix B.

7. Petitioners herein allege that by practice and erroneous interpretation of a Rule of Court the United States Court of Claims is routinely and unconstitutionally delegating its Article III authority to Article I Statutory Commissioners designated "Trial Judge", in the following particulars, to wit:

8. In the combined causes of *Earl Loesch and Henriella Bynon, et al. v. The United States*, Cause No. 240-75, Thomas J. Lydon undertook to function as an Article III Judge rendering his decision based upon selected Findings of Fact to support that decision. He did not follow the Pre-Trial Order on issues.

a. On *January 13, 1981* the

Panel of three Article III Judges heard (twenty minutes per side) oral argument. Chief Judge Cowen in appeal language addressed Counsel:

> "We have very little time here. We have a decision by a very competent Judge and you must, if you can, tell us why we should not adopt his decision."

b. The record consisted of more than 6,000 pages of pleadings and testimony compiled over four weeks of trial before Statutory Commissioner Lydon, and more than 6,500 exhibits.

c. Justice Cowen agreed, in argument, to take judicial notice of House Document 306, First Session, 74th Congress 1935, but the record sent up to this Court contains no transcript of that hearing and no order indicating said notice was, in

fact, taken of the 198-page technical volume.

d. On *March 11, 1981* the Court of Claims adopted the Opinion of Statutory Commissioner Lydon, and his Findings of Fact. A copy of that Order is Appendix C.

e. Petitioners contend that in *Loesch, et al.* the consolidation of so many causes requiring each to support his individual claim of taking did not follow the "Agreed Pre-Trial Entry" of the issues to be tried, to wit: Damage by the entire series of dams on the Ohio and its tributaries in fourteen (14) States.

f. On *May 15, 1981* the Court of Claims denied Petitioners *Loesch, et al.* Motion for Rehearing.

g. On *May 20, 1981* the Petitioners *Loesch, et al* requested the Record be sent up to the Supreme Court. The record sent on is not

complete.

h. A Petition for Enlargement of Time Within Which to File a Petition for Writ of Certiorari was filed therein on *July 30, 1981* and an extension was granted until *October 12, 1981*.

9. The issues actually presented as to the Statutory Commissioner's disqualification were and still are:

[1] Whether Commissioner Lydon has already decided that the Corps of Engineers may deprive the Petitioners of their Fifth Amendment Just Compensation by:

(a) Issuing Regulations in derogation of Congressional Mandate;

(b) Promulgating a line for lower taking which sounds like the legal terminology for the historical Ordinary High Water Mark but does not denote the true navigable servitude;

(c) Inaccurate and incomplete

verbal descriptions of the alleged take in Offers to Sell, Warranty Deeds of Flowage Easement and Declarations of Take designed to misrepresent the size of the take and its location;

(d) Omitting on-the-ground surveys which are required by statute;

(e) Preparing inaccurate maps from compilations to display to the landowners and the Court;

(f) Concealing or attempting to conceal the 1911-14 Survey Maps of the Ohio River which are the final recorded on-the-ground survey of the Ordinary High Water Marks (both banks) of the Ohio River before cannelization;

(g) Hiring experts to refute their numerous "prior inconsistent" Reports to Congress as contained in the Congressional Record, the Federal Register and Documents Published

and distributed by the Government Printing Office;

(h) Conducting a month-long trial presenting testimony of deliberately uninformed employees.

[2] Commissioner Lydon has already decided that he need not address the substantial issues whether or not:

(a) The Respondent has the burden of proving compliance with its Trust to establish a definite legal description of its alleged servitude; to locate by legal on-ground survey and to disclose factors comprising its alleged appraisal of damages caused by the attempted take;

(b) Material misrepresentations were made by the Corps in its dealings with the landowners;

(c) The Corps has no authority to issue Unconstitutional Regulations through which Petitioners-Landowners

were misled as to their legal rights to compensation.

(d) The Corps regulations, as notice to the whole world, were unconstitutionally restrictive and contrary to Supreme Court decisions binding on the Court of Claims;

(e) The OHWM is the recorded-by-survey Ordinary High Water Mark of the river in its natural state;

(f) The Navigable Servitude is below the historically surveyed Ordinary High Water Mark;

(g) The Corps is the delegated trustee of the record of the Ordinary High Water Mark as it existed on the Ohio River in its natural state;

(h) The Corps had a duty to resurvey, on the land of the Petitioners, according to the Recorded Plat by which they took title, the Recorded OHWM of 1911-14 being the last recorded survey of the Ohio

River in its natural state;

(i) The Corps had an affirmative duty by Congressional Mandate to disclose to the landowners the factors used in arriving at the appraisal of damages for the alleged take;

(j) The Petitioners were damaged by the Unconstitutional and unlawful conduct of the Corps and continue to be so damaged;

(k) The conduct of the Corps having been designed to mislead the landowners estoppes the Corps from pleading *laches*, or statute of limitations, and that the Petitioners claims are timely;

(l) The damages are continuing and that there is a duty of the Corps to take measures to stop or to mitigate future damages to these Petitioners;

(m) By Regulation the Corps descriminately excluded appropriated

authority and relief for damages to private property along the Ohio River;

(n) Money damages alone are inadequate and not a viable remedy to Petitioners;

(o) Riprap or similar physical protection of the Petitioners land is the only viable remedy;

(p) Petitioners have been irreparably damaged and have not received Just Compensation;

(q) Petitioners proposed Findings of Fact unopposed by Respondent and supported by the evidence in the transcript should be adopted by the Court;

(r) Based upon the Record the facts clearly establish as a matter of law that the Petitioners are entitled to the relief sought; including "Class Action" status;

(s) Only the issue of damages

shall remain to be tried.

[3] Petitioners contended and contend herein more than dissatisfaction. It is UNCONSTITUTIONAL application of Rules.

(a) In *Loesch, et al.* Petitioners filed 1,313 Proposed Findings. Respondent filed NO OBJECTION to 1,050 (or 80%). Of Respondent's 265 "Objections" only 57 referenced the Court to the transcript for a contrary view. Of Respondent's 57 references to the transcript only 16 cited a total of 11 of Respondent's Exhibits.

(b) Respondent filed 171 Proposed Findings. Petitioners filed NO OBJECTION to 52;

(c) The "Trial Judge" as Statutory Commissioner recommended "Findings of Fact" totalling 106, which so closely follow those of the Respondent as to appear that they and the recommended

OPINION were, in fact, the work product of the Respondent United States, Department of Justice, Trial Counsel;

(d) The "Panel" then adopted without a single modification the *verbatim* package, which is contrary to physical laws of nature and contrary to law, including decisions of the United States Supreme Court and of the very same United States Court of Claims of recent months. The only distinction between recent Court of Claims decisions is the magnitude of the damages, which would be proven as to the Ohio River after the issue of liability in the bifurcated trial has been ultimately resolved.

10. The Court of Claims Rules are being stretched beyond Constitutional Bounds to an abuse of discretion and to an effective denial of justice.

11. Petitioners herein seek to avoid repetition of such abusive practice by a Stay Order mandating active participation of Article III Judges as opposed to lip service.

12. The limitations on delegation of authority are elsewhere defined.

28 U.S.C. 2503 provides only for a report of findings of fact and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the Court.

28 U.S.C. § 636(1) (C) provides, in part:

> "A judge of the Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."

13. To conclude therefrom that the "Trial Judge" (or Statutory Commissioner,

or whatever Article I Judge be called), need only make a Report of those Findings which are in dispute and to frame a recommended OPINION based on only those Findings alone is to deny due process. Neither he nor the Court of Claims has any right to bury undisputed facts.

14. If that practice has been tolerated since the Supreme Court Rule of review from the Court of Claims shall be by Petition for Writ of Certiorari adopted in 1948 then Justice Burger is wholly justified in his evaluation of the competency or lack thereof of the Members of the Bar. This Counsel can not accept this limited edition of justice as that contemplated by the Constitution or *U. S. v. Raddatz* __ U.S. __ 65 L.Ed.2d 424, 100 S.Ct.__.

15. On *April 6, 1981* Petitioners herein *Baskett, et al.* moved for Statutory Commissioner Lydon to Judicially Notice House Document 306 First Session, 74th Congress 1935, and an

unpublished Construction Environmental Impact Statement on the Cannelton, Newburgh and Uniontown Lock and Dam Projects.

16. On or about *April 16, 1981* Petitioners herein moved for the removal of Commissioner Lydon as disqualified for failure to consider empherical evidence and for failure to follow the physical laws of nature.

17. On *May 29, 1981* the Court of Claims Judge Miller found Commissioner Lydon to be competent to "hear" these cases.

18. On or about *June 6, 1981* Petitioners petitioned for a review of that Order.

19. On *July 21, 1981* the Panel affirmed Judge Miller's limited characterization of Petitioners basis for disqualification as only one of dissatisfaction.

20. On *July 27, 1981* Commissioner Lydon denied the motion to take Judicial

Notice of House Document 306 and a buried, unpublished Environmental Impact Statement, contending it was an evidentiary matter to be decided at Pre-Trial and/or Trial. Petitioners are prejudiced by said decision. Exhibit D.

21. On *August 3, 1981* Commissioner Lydon issued Standard Pre-Trial on Liability (Rule 111), set forth herein as Appendix E.

Petitioners contend that the Order denying disqualification of Statutory Commissioner Lydon amounted to an unconstitutional delegation of authority to an Article I Judge, subjecting Petitioners to the projected expense of four (4) months of useless hearings and expense in preparing a record which, as in *Loesch, et al.* will evidence the issues raised by Petitioners but which will never be reviewed by even one Article III Judge, and this is certainly not the due process guaranteed by

the United States Constitution.

Petitioners contend that the continuation of the unconstitutional procedure adopted by Rule as routine by the Court of Claims denies these Petitioners a fair trial on the merits.

An Article III Panel without examination of the record can not, upon a simple review of an Article I Commissioner's Opinion and Findings of Fact in support thereof, weigh the preponderance of all the evidence and render an impartial judgment after 40 minutes of argument.

These Fifth Amendment Taking cases originated in the Court of Claims and must be treated with full Constitutional *de novo* trial rights by the Article III Judges.

Delegation to a Statutory Commissioner designated "Judge" must mandate that he "report" to the Panel "Findings of Facts" on all material issues raised by the evidence and limited by the "Pre-

Trial Entry". Otherwise, there can be no weighing of the evidence by the Article III Judges as required by the Constitution.

WHEREFORE, Petitioners pray for an Order mandating that the Court of Claims perform its statutory duty, that it be mandated to require a competent Statutory Commissioner to report all findings of facts pro and con to all material issues so they can be weighed by the Panel of three Article III Judges in arriving at their decision, and for all other relief deemed proper in the premises.

Respectfully submitted this 22nd day of September, 1981.

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Of Counsel:
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IN THE

UNITED STATES COURT OF CLAIMS

AVABELLE BASKETT BRANDENBURG, KENTUCKY (1)	)
MARY STEPBENSON BUECHTER LOUISVILLE, KENTUCKY (2)	)
GILBERT CANNON and SHARON CANNON MAUCKPORT, INDIANA (3)	)
BAYWARD J. COLE and MARY ANN COLE LEAVENWORTH, INDIANA (4)	)
DOROTHY COLE LEAVENWORTH, INDIANA (5)	)
JAMES L. COLE LEAVENWORTH, INDIANA (6)	) CAUSE NO 161-78
HAZEL EDGERTON NEWBURGH, INDIANA (7)	)
GEORGE E. EGGER LOUISVILLE, KENTUCKY (8)	)
WARREN FISHER MAUCKPORT, INDIANA (9)	)
MARGRETE NIELSEN HERON LEAVENWORTH, INDIANA (10)	)
MACKEY KNEAR and MARY JANE KNEAR ELIZABETH, INDIANA (11)	)
DOROTHY A STEPHENSEN KRUTZ LOGANSPORT, INDIANA (12)	)

APPENDIX "A"

BRUCE K. LORCH)
ANCHORAGE, KENTUCKY)
)
HOWARD B. MARRS)
GEORGETOWN, INDIANA)
)
CLARENCE PANNETT)
CANNELLTON, INDIANA)
)
WILLIAM D. SCHRADER and)
CAROLINE SCHRADER)
LEAVENWORTH, INDIANA)
)
EMMETT TERRY and)
MILDRED TERRY)
TELL CITY, INDIANA)
)
vs.)
)
THE UNITED STATES OF AMERICA)
)
Defendant)

PETITION FOR DAMAGES

Come now the Plaintiffs and for their action against the Defendant, the United States of America, and having similar claims against the United States of America, allege and say that:

1. Plaintiffs are citizens and residents of the State of Indiana and State of Kentucky and are the owners of certain real estate lying adjacent to the banks of the Ohio River

and more particularly as described in the records maintained in the Recorder's office of their respective county.

2. This action is brought by plaintiffs under the provisions of Rule 63 of the Rules of the United States Court of Claims by Plaintiffs owning fees or lesser interests such as easements, tenancies, reparian rights, or rights of reversion in the land described hereinabove and whose interest in the land is being unconstitutionally taken by the Defendant as more fully hereinafter set out.

3. The claims of the named plaintiffs are identical in that they entered into an easement flowage agreement with the United States and their land was flooded beyond the contemplation of those agreements.

4. Jurisdiction of this Court is proper under 28 U.S.C. §1491 and 28 U.S.C. §1845 et seq. Said Act is commonly known as the "Tucker Act".

5. United States Congress authorized United States Army Corps of Engineers under authority of 33 U.S.C. §5; 1909 Rivers and Harbors Appropriation Act to construct a series of low-lift dams, forty-four (44) in number, hereinafter called low-lift dams, to maintain a navigation channel nine (9) feet in depth on the Ohio River. Fair and adequate flowage easements were purchased by the Defendant from some of the Plaintiffs for construction of these dams, and some land was flooded without the purchase of flowage easements by the defendant.

6. The low-lift dams did not perform as intended in that their estimated life was fifty (50) to seventy-five (75) years, but they filled with sand and other sediments within twenty (20) to thirty (30) years.

7. The United States Army Corps of Engineers did not advise the United States Congress that river was filling with sediment but sought funds from United States Congress

under the authority of 33 U.S.C. §5 of Rivers and Harbors Act to repair the low-lift dams.

8. The United States Army Corps of Engineers represented to United States Congress that it would be more economical to replace forty-four (44) low-lift dams with fourteen (14) high-lift dams. United States Congress did authorize funds under provisions of 33 U.S.C. §5, the repair section for a nine (9) foot channel, to construct the high-lift dams over a period of twenty years.

9. United States Army Corps of Engineers sought authorization from United States Congress on same basis as above for "repair" of low-lift dams on Upper Mississippi River, but was enjoined by Judge Charles R. Richey of United States District Court, District of Columbis, 382 F. Supp. 610, (1974), for reason that evidence showed that United States Army Corps of Engineers

were attempting to place high-lift dams on Upper Mississippi River like they had on The Ohio River to maintain a twelve (12) foot channel which required authorization by 33 U.S.C. §5 of the Rivers and Harbors Act. Subsequent to the 1974 decision of Judge Richey the United States Congress by Act H.R. 8309, dated October 17, 1977, under authority of Rivers and Harbors Act, 33 U.S.C. §5, did authorize repairs to a low-lift dam on Upper Mississippi River to maintain a nine (9) foot channel.

10. All high lift dams on the Ohio River have the capability of holding a twelve (12) foot channel contrary to law.

11. United States Army Corps of Engineers personnel's misrepresentation of the true facts to the United States Congress resulted in a shortage of funds to purchase proper flowage easements for the high-lift dams.

12. Shortage of funds resulted in fraud and misrepresentation in purchasing of flowage easements, setting of ordinary high water marks in an unconstitutional manner, and bank erosion damages due to improper design and management of the high-lift dams.

13. Plaintiffs have demanded that the United States Army Corps of Engineers, as defendant's agent, stop the erosion damages to plaintiffs' land like it has by rip-rapping shore lines of the Defendant's property and other publicly owned property slong the Ohio River shore line, but the United States Army Corps of Engineers refuses to stop the erosion.

14. Plaintiffs have incurred obligations to pay attorney fees and other expenses to litigate this claim.

15. Plaintiffs claim damages in sum of $15,000,000.00 for eroded land, flowage easements purchased in an unlawful manner, and for river bank protection from future damages.

APPENDIX "A" (cont'd)

WHEREFORE, plaintiffs pray for damages in sum of $15,000,000.00, interest on said sum, court costs , attorney fees, expenses of litigation, and for all other relief just and proper in the premises.

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Phone: 812-547-3432

By_____
Norman E. Hay

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IN THE UNITED STATES COURT OF CLAIMS

Trial Division

(Filed: July 31, 1981)

AVABELLE BASKETT, et al.	)
	)
v.	) No.
	) 161-78
THE UNITED STATES	)
	)
DAVID ALLEN and EVA ALLEN, et al.	)
	) No.
v.	) 340-78
	)
THE UNITED STATES	)
	)
DONALD ALLEN, et al.	)
	) No.
v.	) 317-79L
	)
THE UNITED STATES	)
	)
BOONE COUNTY, STATE OF KENTUCKY, etc.	)
	)
v.	) No.
	)
THE UNITED STATES	) 311-80L
	)
CITY OF COVINGTON, KENTUCKY, et al.	)
	)
v.	) No.
	) 616080L
THE UNITED STATES	)

TRIAL JUDGE'S ORDER CONSOLIDATING CASES FOR PURPOSES OF FURTHER PROCEEDINGS

The above five cases present enough common

issues of fact and law sufficient to warrant consolidation for purposes of further proceedings. Consolidation at this stage of the proceedings most likely will serve the interests of efficiency and expedition relative to the disposition of these litigations.

Accordingly, it is ordered that these five cases be consolidated for purposes of all further proceedings in this case. In this regard, the case of Baskett v. United States, No. 161-78, will be the lead case for purposes of letterhead, case caption reference, etc.

Thomas J. Lydon

Thomas J. Lydon
Trial Judge

IN THE UNITED STATES COURT OF CLAIMS

(Decided March 11, 1981)

No. 240-75 EARL LOESCH and HENRIELLA BYNON v. THE UNITED STATES

No. 430-75 GEORGE R. WAGNER, ET AL. v. THE UNITED STATES

No. 435-75 NICHOLAS and MARGARET PURCELL v. THE UNITED STATES

No. 1-76 JOHN H. McGEHEE, ET AL. v. THE UNITED STATES

No. 111-76 JAMES CHOUINARD, ET AL. v. THE UNITED STATES

No. 307-77 LETHA M. TOLLIVER, Administratrix of Estate of Alfred Tolliver, deceased, ET AL. v. THE UNITED STATES

Norman E. Hay, attorney of record, for plaintiff. *Charles S. Gleason, Gleason, Hay & Gleason*, of counsel.

Hubert M. Crean, with whom was *Assistant Attorney General James W. Moorman*, for

defendant. *Dorothy R. Burakreis*, of counsel.

Before Cowen, *Senior Judge*, Kunzig and Smith, *Judges*.

OPINION

PER CURIAM: These consolidated cases come before the court on plaintiffs' exceptions to the recommended decision (including an opinion, findings of fact, and conclusions of law) filed by Trial Judge Thomas J. Lydon.

The court hereby adopts the trial judge's findings and opinion as the basis for its judgment in the case. The findings, however, are not printed herein since his opinion sets forth the facts necessary for an understanding of the decision.

Therefore, the court concludes as a matter of law that plaintiffs are not entitled to recover, and their petitions are hereby dismissed.

OPINION OF THE TRIAL JUDGE

LYDON, *Trial Judge:* In these six consolidated cases,[1] owners of land adjacent to and/or on tributaries of the Ohio River,[2]

[1]These six cases were tried at a single trial session and, although some of the cases present minor differentiating factors, it is

believed that consolidation, at this state, and disposition of these cases by a single opinion is appropriate under the circumstances. Only the issue of liability is before the court, quantum having been reserved for further proceedings, if necessary.

[2]Claims are presented by 23 plaintiffs, husband and wife are treated as one plaintiff, involving 34 separate tracts of land. The claims of one plaintiff (Benner in No. 430-75) were withdrawn at trial and the petition as to these claims dismissed. While all plaintiffs owned the tracts in issue at time of trial, some plaintiffs were not the owners of said tracts at the time some of the operating events in issue took place. The significance of this observation will become apparent later in this opinion. It should be noted that similar claims by 88 additional Ohio River riparian landowners were filed after the trial of these cases (Ct. Cl. No. 161-78; Ct. Cl. No. 340-78; and Ct. Cl. No. 317-79).

seek to recover just compensation under the fifth amendment, on the theory of inverse condemnations, for damages to their lands resulting, they claim, from governmental actions emanating from the construction and operation of certain high-lift navigation locks and dams on the Ohio River. In substance, plaintiffs' claims are twofold. First, plaintiffs maintain that the construction and operation of the dams in question were such as to cause erosion on their lands thereby, in effect, taking their lands and entitling them to just compensation. Second, plaintiffs contend that defendant, acting through the United States Army, Corps of Engineers (the Corps), in obtaining flowage easements from them in connection with the dam projects in question was guilty of fraud and misrepresentation, particularly in the determination of the ordinary high water mark (OHWM), such that the compensation plaintiffs received for said easements was less than they were entitled to receive for what was

actually taken from them.[3] For reasons to be discussed hereinafter, it is my opinion that plaintiffs are not entitled to recover and that their petitions should be dismissed.

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[3]The ordinary high water mark (OHWM) formed the lower limit of the flowage easement acquired by defendant. The navigational servitude of the government extends to the OHWM. *United States v. Willow River Co.* 324 U.S. 499, 509 (1945). The government must only pay for lands taken above the OHWM. *United States v. Virginia Electric & Power Co.* 365 U.S. 624, 627-28 (1961); *Barnes v. United States*, 210 Ct. Cl. 467, 475, 538 F. 2d 865, 870 (1976). The lower the OHWM, the greater the amount of land deemed taken and the greater the compensation due therefor. Absent other considerations, to the extend that plaintiffs can establish that the OHWM determination as to each tract in issue are erroneously high, they would be entitled to additional compensation. See *Vanada v. United*

States, 202 Ct. Cl. 1121, 1122-23 (1973).

I.

The Ohio River is formed by the junction of the Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania, and then flows for 981 miles to Cairo, Illinois, where it joins the Mississippi River. It is a navigable river for its entire length, falling 429 feet in its 981-mile course from Pittsburgh to Cairo.

The Ohio River is considered to be a "pleistocene river," i.e., it was formed at or before the glacial period. This period is believed to have begun about a million years ago. While the Ohio River is considered to be basically an alluvial river, i.e., one which erodes, transports and deposits sedimentary materials, its riverbanks at many locations are composed of bedrock, which serves to control not only the position of the channel at those locations but also to control the river's ability to erode at those points. These bedrock sites can contribute to erosion

at other riverbank sites by diverting river currents toward such sites. Similarly, river current action serves to explain why riverbank erosion generally occurs on the outside of bends in the river.

The Ohio River, like other rivers, is dynamic. The highly variable flow of an unregulated river exerts considerable erosional forces on a river's bed and banks. In the general dynamics of a shifting and meandering alluvial river, materials will shift position by erosion at one riverbank point and material deposition at another point. Accordingly, at any given time on most natural rivers, including the Ohio River, riverbanks can be found to be eroding, other riverbanks in the process of healing, and still other riverbanks in stable condition. Erosion of riverbanks on the Ohio River, as a natural phenomenon, has been taking place for hundreds of years.

Climatic conditions greatly affect river dynamics. It is well established that during flood periods, when river flow velocities are

high, riverbank erosion generally can be expected to occur in varying degrees depending on circumstances. Velocity of the flow of a river, it is conceded, plays a most important role in riverbank erosion. It is also clear that precipitation affects riverbank conditions and contributes to erosion thereof. Further, uses, urban and/or agricultural, to which riparian lands are put can also cause and/or contribute to erosion of riverbanks. Finally, the construction and operation of artificial structures on rivers can, under some circumstances, alter the hydrology of river flow characteristics, sediment propensities, etc., such as to affect the natural inclinations of river action and thereby induce riverbank erosion at points where it may not have ocurred absent the artificial structures. In any discussion of erosion, factors of topography, soil composition and characteristics, and river site location play important roles in causative determinations.

Improvement of the Ohio River for naviga-

tion purposes began in 1824. In 1878, a 6-foot canalization of the upper Ohio River began by construction of a system of locks and movable dams. Later a 9-foot canalization program throughout the entire length of the river was completed in 1929 with the construction of a system of 49 low-lift locks and dams. These low-lift dams had an estimated life of between 50-75 years. After the Second World War, there was a tremendous increase in river tonnage on the Ohio River. This, in turn, resulted in increases in the size of tows and barges on the river. This increased traffic and larger river vessels created delays at the low-lift dams and presented a serious obstacle to navigation on the Ohio River.[4]

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[4] There is no reliable evidence in the record which supports plaintiffs' allegations that the low-lift dams were filling with sediment, were otherwise deficient or failed to perform as intended, and thus had to be replaced.

It seems to be conceded that these low-lift dams did not materially interfere with the downward course of the river and that they did not in many places materially raise the level of the water. While plaintiffs argue to the contrary, and the record is not crystal clear on the matter, the totality of the record supports the view that construction and operation of the low-lift dams did not abrogate the natural ordinary high-water mark which existed along the Ohio River prior to the construction of said dams. See *United States v. Cress*, 243 U.S. 316, 321 (1917). It is conceded that during high water, i.e., flood periods, the low-lift dams exercised no control over the river and the river, during those periods, flowed in a natural, unobstructed manner.

In 1954, a modernization program to aid navigation on the Ohio River was undertaken. This program called for the construction of 19 high-lift locks and dams to replace the exist-

ing low-lift dams on the Ohio River. The high-lift dams on the Ohio River were constructed under the authority of the River and Harbor Act of March 3, 1909, 35 Stat. 817.[5] As of the

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[5]Plaintiffs argue in their proposed findings of fact that the Corps was without authority from Congress to engage in this modernization program, relying on language in *Atchison, Topeka and Santa Fe Ry. Co. v. Callaway*, 382 F. Supp. 610, 617 n. 15 (D.C. Cir. 1974), that, at best, can be considered dicta or an aside. As such, it is entitled to very little weight. See *Ingo v. Koch*, 127 F. 2d 667, 677 (2d Cir. 1942). For subsequent history of the *Callaway* case see 431 F. Supp. 722 (1977) and 459 F. Supp. 188 (1978). There is absolutely no reliable evidence in this record which would support a finding that the high-lift dams in issue were constructed without congressional authority. Moreover, plaintiffs do not mention this argument in their briefs. Accordingly, as the matter is presented for consideration

at this time, neither fact nor law have been advanced by plaintiffs which would justify a conclusion here that this modernization program was undertaken and completed, for the most part, without congressional authorization.

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date of trial, 17 of the high-lift dams had been constructed and were operational. One high-lift dam was under construction as of the date of trial, and construction of the last high-lift dam had been authorized. As a result of this modernization program, a smaller number of high-lift dams with larger locks eliminated the time-consuming and costly multiple lockages required by a greater number of low-lift dams and thereby improved navigation on the Ohio River. Three of these high-lift dams are involved in this litigation, i.e., the Meldahl Locks and Dam, the Cannelton Locks and Dam, and the Newburgh Locks and Dam.

Meldahl Dam is located some 436 river miles below Pittsburgh, Pennsylvania.

Construction on this project began in 1959 and was completed in 1964. The normal pool elevation of 485 feet mean sea level (m.s.l.) was reached on March 28, 1965. Meldahl Dam replaced four low-lift dams (Nos. 31, 32, 33 and 34). The pool created by this dam covered some 96 river miles and terminated below the Greenup Locks and Dam. Eleven plaintiffs own land adjacent to the Ohio River within the Meldahl pool. In general, construction of the Meldahl Dam, and attendant impoundment of river water, raised the level of the Ohio River in the vincinity of the riparian lands of plaintiffs Chouinard, Griffith, McNelly, Poston, C. Rice, E. Rice, Schwab, Wood and Skelton by 24 feet, and in the vicinity of the riparian lands of plaintiffs Cunningham and Tolliver by 17 feet. It should be noted that there was only a 2-foot increase in the water level of the Ohio River in the upper reaches of the Meldahl pool as a result of the construction of the dam. There is no reliable evidence in the record as to whether

or not the Meldahl Dam was constructed with a 12-foot channel capability. The dam was operated, as far as can be determined on this record, to provide a 9-foot channel. Flowage easements attendant to this project were obtained by the Corps by purchase or condemnation from riparian landowners during the period 1961-1963.[6]

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[6]These flowage easements, in general, gave the United States Army, Corps of Engineers (the Corps) the perpetual right to permanently and/or occasionally overflow, flood and submerge riparian fast lands, i.e., lands above the ordinary high water mark (OHWM), above-stated elevations. These flowage easements also gave the Corps the continuing right to clear and remove, below stated elevations, timber, brush, debris and natural obstructions which in the opinion of the Corps may be detrimental to the dam projects.

Cannelton Dam is located approximately 3

river miles upstream from Cannelton, Indiana, and some 114 river miles downstream from Louisville, Kentucky. Construction on this project began in 1962, and the project was completed and dedicated in 1974. The normal pool elevation of 383 feet m.s.l. was permanently reached on August 17, 1972. Cannelton Dam replaced three low-lift dams (Nos. 43, 44 and 45). The pool created by this dam covered some 114 miles and terminated below the McAlpine Locks and Dam at Louisville, Kentucky. Eleven plaintiffs own land adjacent to the Ohio River within the Cannelton pool. In general construction of the Cannelton Dam, and attendant impoundment of river water, raised the level of the Ohio River in the vicinity of the riparian lands of plaintiffs Loesch, Bynon, Wagner and Leatherbury by 25 feet, in the vicinity of the riparian lands of plaintiffs Glenn, Purcell, J. McGehee (Tract 3828 E), Cox, Eaton and Williams by 16 feet, and in the vicinity of the riparian lands of plaintiffs E. McGehee and J. McGehee (Tracts 5101 E

and 5112 E) by 9 feet. It should be noted that there was no increase in the water level of the Ohio River in the upper reaches, comprising about 20 percent of the total pool area, of the Cannelton pool as a result of the construction of the dam. The Cannelton Dam was constructed so as to provide for a 12-foot channel capability. However, at all times material herein, the dam has been operated to provide for a 9-foot channel and a normal pool elevation of 383 feet m.s.l. Flowage easements attendant to this project were obtained by the Corps by purchase or condemnation from riparian landowners during the period 1964-1967.

Newburgh Dam is located less than 2 river miles upstream from Newburgh, Indiana. Construction on this project began in 1965, and the project was completed and dedicated in 1975. The normal pool elevation of 358 feet m.s.l. was reached in January 1975. Newburgh Dam replaced two low-lift dams (Nos. 46 and 47). The pool created by this dam covered some 55

dams maintained the river at its appropriate depth by increasing or decreasing dam gate openings as required in order to hold the water level at normal pool stage. However, during periods of high flow, i.e., flood conditions, the gates of these dams are fully opened and these dams exercise no control over the river or its flow. As a result, during periods of high flow, the Ohio River is essentially flowing and acting in its natural state. In terms of flow, it was determined that when the river flow reached 325,000 cubic feet per second (cfs), the gates of these dams were fully opened, and an open, natural, and unrestricted river existed. Hydrographic data germane to the pool areas in issue showed that in 1966 river flow exceeded 325,000 cfs three times; in 1967 twice; in 1968 once; in 1969 none--a dry year; in 1970 no evidence; in 1971 four times; in 1972 four times; in 1973 four times; in 1974 four times; in 1975 four times; in 1976 two times; and 1977 none--a dry year.

After recession of high river flow to the point where the gates can again control, the high-lift dams commence operation to maintain a normal pool level, i.e. 485 feet m.s.l. in the case of the Meldahl Dam, 383 feet m.s.l. in the case of the Cannelton Dam, and 358 feet m.s.l. in the case of the Newburgh Dam. It is to be noted that as a result of the rise in water level by high-lift dam impoundment, there was a smaller range of fluctuation from normal pool to flood stage and back down to normal pool than was the case before impoundment. It is also to be noted that during periods of low or normal flow, the high-lift dams do serve to reduce the velocity of flow through their pools. As indicated earlier, velocity of river flow is a vital factor in riverbank erosion.

The record in this case clearly establishes that the construction and operation of these high-lift dams do not cause floods, or increase the number of floods, or affect flood peaks and time intervals, or increase the

effect of flood events. These facts were confirmed by a study conducted by the University of Cincinnati, which study was prompted by charges that the high-lift dams had increased the number and frequency of floods on the Ohio River.

II.

It is well established that the Federal Government under the commerce clause of the Constitution, has the power to improve navigable waters in the interest of navigation. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53, 70 (1913). It is likewise established, however, that if any such improvement on a navigable stream raises the water level in the river and thereby directly damages privately-owned property situation above the OHWM, the government is liable, on the theory of a fifth amendment taking, for the ensuing damages. *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 806-08 (1950); *United States v. Cress*, 243 U.S. 316, 320-2], 326-29 (1917); *Goose Creek Hunting Club, Inc. v.*

United States, 207 Ct. Cl. 323, 331, 518 F.2d 579, 583 (1975); see *Barnes v. United States*, 210 Ct. Cl. 467, 474-76, 538 F.2d 865, 870-71 (1976) and cases cited therein. In situations where governmental action in raising the level of navigable waters is the direct and proximate cause of resulting erosion on privately-owned property above the OHWM, the government has been held liable for such damages. See *United States v. Dickinson*, 331 U.S. 745, 750 (1947); *Stockton v. United States*, 214 Ct. Cl. 506, 513-15 (1977). On the other hand, if there is no proper showing that governmental action was the proximate and direct cause of the erosion damage, there can be no liability on the part of the United States for a fifth amendment taking. *Yazel v. United States*, 118 Ct. Cl. 59, 70-73 (1950); *Coates v. United States*, 124 Ct. Cl. 806, 811-13 (1953). See *Sanguinetti v. United States*, 264 U.S. 146, 149-50 (1924); *Matthews, Trustee v. United States*, 87 Ct. Cl. 662, 719-20 (1938).

The erosion issue in these cases is not

legal, it is factual. The question to be resolved is whether the construction and/or operation of the involved structures was the direct and proximate cause of the erosion which has taken place, and is taking place, on plaintiffs' riparian lands. Plaintiffs maintain that the impoundment of water by the construction of the Meldahl and Cannelton Dams raised the level of the Ohio River in the vicinity of their riverbank properties thereby permitting wind and vessel waves to erode their riverbanks at higher levels than was the case before impoundement.[7] As noted earlier, the water

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[7]Plaintiffs claim that the damages they seek are for erosion to their "fast" lands above the OHWM. Flowage easements were acquired from plaintiffs covering lands above the OHWM (see note 6, supra). In view of the fact that compensation was paid to plaintiffs for these flowage easements, i.e., they were not gratuitous conveyances,

plaintiffs' right, absent other considerations (see note 11, infra), to recover for erosion damages within the flowage easement areas is most doubtful. See *Stockton v. United States*, 214 Ct. Cl. 506, 515-18 (1977). There is no reliable evidence of overreaching or actionable misrepresentation on the part of Corps personnel in obtaining these flowage easements. As noted by the court in *Stockton v. United States, supra,* 214 Ct. Cl. at 515, defendant's acquisition under normal conditions, which is the situation herein, of a flowage easement, "*** would not carry with it any warranty that the water would always be smooth. If the impounded water were wide enough for waves to build up, and if the land were easily erodible, it would be up to the owner to exact compensation for the added exposure, or else to protect himself by riprapping or other engineering measures ***." The language to be found in flowage easement acquisition documents, e.g., warranty deeds and stipulation of the parties attest to the fact that the

compensation paid for said flowage easements was in full satisfaction of any and all claims arising out of said taking. The testimony of the plaintiffs indicates their awareness of erosion potential at or about the times the flowage easements were being acquired. There is no evidence in this case of express reservations by plaintiffs herein for any future erosion damage to their lands. Compare *Tri-State Materials Corp. v. United States*, 213 Ct. Cl. 1, 4, 550 F.2d 1, 3 (1977).

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level in the vicinity of the riparian land of one plaintiff, Dickenson, was not raised. It is important to note that plaintiffs contend that wave action is the mechanism, or cause, of the erosion on their properties. There is no support in this record for plaintiffs' bald allegation in their brief that the groundwater table, which plaintiffs assume is directly related to the rise in pool water level, weakened the banks and made them more susceptible to wave action and slumping. The

record indicates that one cannot presume that merely because the pool level was raised the water table on adjoining land must also be deemed to have been raised. In some areas the water table may have been raised whereas in other areas the water table may not have been raised. In maintaining that the involved structures were directly and proximately responsible for the erosion damage on their banks, the burden of proof rests on plaintiffs, and not on the defendant, to establish that a taking has occurred justifying the payment of just compensation. *United States v.* 329.05 *Acres of Land*, 156 F. Supp. 67, 71 (S.D.N.Y. 1957), *aff'd* 263 F.2d 331 (2d Cir. 1959); *see United States ex rel.* T.V.A. v. 137 *Acres of Land*, 406 F.2d 1283, 1287 (6th Cir. 1969).

The trial session in these cases was lengthy and the trial record voluminous, facts confirmed by the extensive findings of fact accompanying this opinion. The factual conclusion reached herein are more fully discussed

in those detailed findings.

The plaintiffs who did testify in these cases established clearly that erosion, in varying degrees, was taking place on their riverbank properties. Defendant concedes this fact. However, it must be borne in mind that "[p]roof of damage alone does not necessarily prove a taking." *Yazel v. United States, supra,* 118 Ct. Cl. at 72. As to the cause of the erosion, the testimony of plaintiffs, to the extent that the matter of causation was addressed by them, was to the effect that the erosion on their riverbanks was not a problem until after the dams were constructed and the water impounded. Accordingly, they reason, the high-lift dams must be responsible for the erosion. This "post hoc, ergo propter hoc" (After this therefore on account of this) approach to causation is most unpersuasive in the context of this record.[8] It is an

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[8]The record suggests that palintiffs generally were really not attentive to river action on

their banks prior to construction of the involved dams. However, after the dams were constructed their attention became more concentrated on their banks in anticipation of erosion problems. It seems clear that erosion in varying degrees was taking place on riverbank properties in these pool areas prior to construction of the dams.

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approach that was rejected in *Yazel v. United States, supra,* 118 Ct. Cl. at 70-73, where riparian landowners maintained that the bank line of their land had been previously stable, but that after the construction of a levee by Army Engineers many acres of the bank lands were eroded away, all of which, the landowners claimed, was the result of the construction of the levee.

Erosion on rivers and streams is an extremely complex matter from the point of view of its genesis, its effects and its prevention. Why some banks erode and other similar ones do not is not fully known. A

number of variables are involved in the erosion process and these variables may exert their influence individually or in a complex combination, in which case erosion becomes more difficult to understand, predict and treat. In short, the cause(s) of erosion cannot be reduced to simple answers. As a result, these are cases where the testimony of experts is particularly appropriate since the trier of fact is presented with evidence of a highly technical nature involving geotechnical, hydrologic, hydraulic, geological and climatic matters. See *Gisriel v. Uniroyal, Inc.* 517 F.2d 699, 702 (8th Cir. 1975).

Plaintiffs engaged as their sole expert witness, Dr. Wayne R. Lowell (Lowell), a retired geology professor, who, at time of trial, was a consulting geologist involved primarily in the exploration of mineral deposits. He had no professional expertise in river mechanics. Lowell was engaged to serve as an expert some 3 to 4 weeks before trial. He readily conceded that time constraints

precluded a thorough and detailed investigation of matters germane to the opinion he advanced at trial that the raising of the water level by impoundment of the river by the dams in question was directly responsible for the erosion on plaintiffs' bank Lowell's testimony indicates that he considered the construction of the high-lift dams and attendant pool rises as the sole causative factor for the erosion on the plaintiffs' banks and that he failed to give reasonable consideration to other clearly shown possibilities which might serve to explain said erosion on these banks.[9] Lowell's opinion was, at best,

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[9]Lowell visited the banks of only three plaintiffs. The banks of these three plaintiffs were located in the Cannelton pool in areas that were historically unstable and subject to landslides. The record establishes that the slipping and sliding of the banks of these plaintiffs was due primarily to the inherent instability of the colluvial soils as

aggravated by climatic conditions and was not due to the raising of the water level by dam impoundment. Lowell did not visit any other site in the Cannelton pool, nor did he visit any site in the Meldahl or Newburgh pool. Lowell conceded he had never been in the Meldahl pool and was unfamiliar with said pool area. Instead, Lowell reviewed 1977 photographs, placed in evidence by defendant, of the banks of the other plaintiffs and concluded from the erosion depicted in said photographs that said erosion reflected therein was caused by the raising of the water levels in the involved pools. Lowell made no study of the matter; he did not review any hydrological, hydraulic, soils, or climatic data in reaching his opinion. He conceded such data would have been helpful in reaching an opinion on the matter. Lowell was unable to explain why erosion in the upper 20 percent of the Cannelton pool where the water level was not raised at all despite the construction of the dam was similar to the

erosion in the lower portions of the pool where the water level was raised up to 25 feet in places. Such facts suggest most strongly that erosion causes, other than the raising of the water level by dam impoundment, were at work in the pool areas.

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a naked one, lacking supportive empirical data and study. It has been observed that opinion evidence is only as good as the facts upon which it is based. *State of Washington v. United States* 214 F.2d 33, 43 (9th Cir.), *cert. denied*, 348 U.S. 862 (1954). See also *United States v. Sowards*, 370 F.2d 87, 92 (10th Cir. 1966). Accordingly, Lowell's opinion as to erosion causation was not very helpful to the trier of fact and was deemed unpersuasive.[10]

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[10]Lowell was undoubtedly influenced by the conclusions reached in an August 1977 Water Resources Development Report on the Missouri River prepared by the Corps of Engineers,

Missouri River Division, which he relied on in reaching his opinion, to the effect that the consturction of large hydroelectric flood control dams on the Missouri River was responsible, in some measure, for the erosion which occurred on the banks of said river. Lowell had no working relationship, nor personal familiarity with the Missouri River. The record establishes, however, that this report harbors little relevance to the operation and impact of the high-lift navigation dams on the Ohio River. One of defendant's witnesses, Daryl B. Simons, a creditable and experienced expert in the field of erosion, sedimentation, river mechanics and related problems, had worked on the Missouri River and persuasively explained that the Missouri River Dam system was totally different from the Ohio River Dam system such that one could not extrapolate conclusions from the Missouri River Dam system and its effect on riverbank erosion and have them applicable to the Ohio River Dam system.

Lowell testified that 99.5 percent of bank erosion on a river takes place during periods of floods or high water. All of defendant's experts agreed that over 90 percent of riverbank erosion is caused by floods or high water. The testimony of some of the plaintiffs clearly supports these views of the experts. Lowell ostensibly believed, incorrectly it might be added, that the construction of the high-lift dams increased the frequency of floods. Otherwise, his testimony above is definitely at odds with the opinion he offered that the rise in pool levels was the primary cause of the erosion on the plaintiffs' riverbanks. Lowell believed that the energy (velocity) of a river brings about all erosion and that this energy, which can be reflected in the rate of river flow, is greatest at times of high flow or floods. Since, as has been indicated previously, the high-lift dams exercise no control over the river during periods of flood or high river flow, it seems reasonable to

conclude that most of the erosion damage on the plaintiffs' banks is not due to the impoundment of the river but is due to floods and high water. Because these floods or high waters would have occurred absent the presence of the high-lift dams, there is strong reason to find that the erosion plaintiffs complain of is not related to or caused by the construction and operation of the dams in question. See *Yazel v. United States, supra,* 118 Ct. Cl. at 70-71; *Coates v. United States, supra,* 124 Ct. Cl. at 811-12.

As indicated earlier, plaintiffs contend that wave action, wind and tow and/or barge, was the primary mechanism for erosion on their banks. Lowell initially testified in a most generalized manner, that the erosion complained of was caused by undercutting of the banks by wave action. This opinion of Lowell's was not supported by any study or data. Too, it must be remembered, he only visited the sites of three of the 23 plaintiffs, and he never talked to a single plaintiff relative

to conditions on their banks. Factual support for his opinion in this regard is clearly lacking, and his opinion, as a result is entitled to little weight. See *State of Washington v. United States, supra.* Later, in his testimony, Lowell conceded that wind-generated waves were not too important as an erosion causing factor in these cases. Studies conducted by defendant, which were available to Lowell but were not reviewed by him, because of time constraints, established, *inter alia,* the fetch conditions (distance for waves to build up) pertinent to each of the banks in issue and suggest rather persuasively that wind wave action had no significant erosive effect on these banks. As to river traffic waves, Lowell admitted that generally the force of these waves might well be dissipated before they hit the shoreline. The record does suggest that, to the extent river traffic operated close to the shoreline, waves generated by such traffic could have some impact on the shoreline. It is conceded

that raising the water level in the pool by impoundment enabled river traffic, in some instances, to come closer to the shoreline than was the case prior to impoundment. However, there is no evidence in the record of the frequency and/or impact of such occurrences as to each of the properties in issue. Such testimony as is in the record relating to river traffic and its potential for erosion is most generalized and lacking in specificity.[11]

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[11]The size of the waves hitting their riverbanks at normal pool stage, as suggested in the testimony of plaintiffs, was not such as to cause the significant erosion damage taking place on the high banks about which plaintiffs complain. The distance from the land-water interface at normal pool stage to the high bank erosion areas was such that wave action could not reach these areas. More importantly, waves generated by floods and high water would have occurred on the banks at higher levels absent the construction of the dams. The

record supports the view that any wave-generated erosion, whether by wind or river vessel, would be insignificant and subsumed by the erosive forces of high waters or floods which would have occurred absent the dams. Such a conclusion also serves to dispose of plaintiffs' contentions regarding shoreline armoring and tree and sandbar protection. Accordingly, wave action has not been shown to be a substantive erosion factor significantly attributable to the construction and operation of the dams in question. See *Yazel v. United States*, 118 Ct. Cl. 59, 71-73 (1950); *Coates v. United States*, 124 Ct. Cl. 806, 811-13 (1953).

In contrast to plaintiffs' approach to the issue of erosion, which can be characterized as generalized and lacking in investigative detail and study, defendant, through the Corps, engaged in a comprehensive and most detailed study of erosion throughout the Cannelton and Meldahl pools in general and

on each of the plaintiffs' properties in particular. While the impetus for this study undoubtedly was the instant litigations, the scope of the study itself was much broader. The study was directed at system mechanics and basic causes of erosion along Ohio River banks. The Corps was as interested as the litigants in knowing whether the navigation dams were responsible for the erosion of riparian lands on the Ohio River. It might be added that the Corps, as attested to by its study report on the Missouri River, referred to previously, was not adverse to attributing erosion to Corps' dams if the facts, as determined by an appropriate study, showed this to be the case. The findings of fact set forth in great detail the nature and scope of this study. This study, which covered a wide range of various disciplines, was conducted by professional and competent personnel and engendered in the trier of fact a sense of reliability and fairness. Suffice it to say, that defendant's investigative study,

resulting data, and conclusions drawn therefrom are entitled to great weight in resolving the erosion issue now before the court. The bottom line of the study was that the erosion taking place on plaintiffs' riparian lands was not caused by or related to the construction and operation of the high-lift navigation dams in issue.

Defendant presented a number of expert witnesses. The chief consulting experts engaged by defendant were Dr. D. Joseph Hagerty (Hagerty), Dr. Daryl B. Simons (Simons) and Dr. Stanley A. Schumm (Schumm).

Hagerty, at time of trial, was an associate professor of civil engineering and an associate in the Department of Geology at the University of Louisville in Louisville, Kentucky. In addition to his teaching responsibilities, Hagerty performed engineering consulting work. For example, he was retained, as part of a study group, to investigate geological aspects of groundwater flow in Jefferson County, Kentucky, particularly

downtown Louisville in 1972 and thereafter. He was also involved in the preparation of environmental impact statements for the Corps relative to establishment of the pools of the Cannelton, Newburgh and McAlpin Locks and Dams on the Ohio River. As a result, Hagerty had a working familiarity with the Ohio River prior to 1977, when he was engaged by the Corps to head up the erosion investigative study team.

Hagerty was a knowledgeable, well-informed, well-prepared and creditable witness. In his approach to the matter of erosion, Hagerty considered all possible causes for the erosion which was taking place on plaintiffs' banks, including the high-lift dams.[12]

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[12]Hagerty believed that the major cause of the erosion in question was high water or floods. Floods, annual occurrences on the Ohio River, saturated the banks. The velocity of river currents during flood periods created erosive forces which removed and/or reworked materials

on said banks. When flood waters receded, materials were rendered subject to slumpage and erosion by a process called drawdown. Another important erosion cause or mechanism, noted by Hagerty, taking place on some of the banks was piping. This concept described the flow of groundwater preferentially through pervious layers of bank materials on a gradient from the land to the river, exiting at the face of the banks taking with it bank materials. On still other sites, Hagerty noted landslide conditions which were responsible for bank slippage and sliding, which conditions were exaggerated by the wet climatic conditions of the early 1970's. Hagerty also noted that the urban and agricultural uses of the properties in many cases contributed to the erosion process by the introduction of water onto the properties which thereafter flowed toward the river with some erosive ramifications.

After consideration of the mass of data assembled by the study investigation group,

and having viewed firsthand each of the plaintiffs' riverbank properties,[13] and having

[13]Hagerty inspected all of the plaintiffs' riparian lands. Indeed, he inspected all but one site at least twice. He offered his opinions as to the causes of the bank erosion taking place on each of these sites (see note 12, *supra*). His opinion, as to each site where the rise in water level was claimed to be the cause of the erosion, was that the rise in pool level was not responsible for said erosion. As to the Dickenson property, where there was no rise in pool level, Hagerty was of the opinion that the soil materials in the banks were most susceptible to erosion which was aggravated by land use on the property and lateral water flow on a gradient from the land through the bank, pulling materials therefrom to the river. He also noted that the area of erosion on the Dickenson banks was some 40 to 60 feet from the water's edge in an area that reflected drainage

problems. Hagerty's opinions were deemed well presented, supported by the record, and persuasive.

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conducted reconnaissance of the entire Cannelton and Meldahl pools,[14] and having

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[14]Hagerty noted in his investigation that erosion was taking place on high banks some distance from the land-water interface of the normal pool stage. He noted that erosion was taking place on riverbanks in the Cannelton pool in areas where there was no rise at all in the level of the water. In other areas where the land-water interface was protected by armoring, erosion was occurring higher up on the riverbanks. These were also areas in the Cannelton pool where the water level was raised where no erosion was occurring at all. Similarly, in areas of the Meldahl pool when the rise in water level was only 2 feet, the erosion noted in said areas was comparable to the erosion taking place in areas of the

Meldahl pool where the rise in water level was close to 30 feet.

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monitored selected riverbank properties, by piezometers and otherwise, Hagerty offered the opinion that the erosion taking place on each of the claimant's riverbanks was not caused by or related to the construction of the Cannelton, Meldahl and Newburgh navigation dams. Hagerty's opinions, on this record, are entitled to great weight.

Simons, at time of trial, headed up all research projects at Colorado State University. Prior to acceptance of that position, Simons had been involved in the civil engineering field, with emphasis on problems, *inter alia*, of erosion, sedimentation, river mechanics and related matters, as a professor at the University of Wyoming and as an employee at the United States Geological Survey. He has worked on research projects on domestic, e.g., the Mississippi, Missouri and Colorado rivers, and international rivers, e.g., the Nile River.

Simons testified as an expert on hydraulic and sedimentation matters.[15] Simons was a

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[15]Simons' professional experience in matters of sedimentation and his analysis of available Ohio River data gives added weight to his conclusion that the construction of the high-lift dams did not result in a build-up of sedimentation in the Ohio River, a conclusion contrary to one reached by Lowell who did not rely on any Ohio River data or investigation. In Simons' opinion, sediment in the Ohio River system at the present time is transported for all practical purposes in exactly the same way it was transported before navigation dams were installed on the Ohio River. Simons also persuasively refuted Lowell's contention that after the high-lift dams had impounded the water, the created pools had characteristics of glacial lakes.

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knowledgeable, experienced, informed and creditable witness.

Simons personally visited the sites of all the plaintiffs except those of plaintiffs Skelton and Tolliver. He also surveyed the Cannelton and Meldahl pool areas generally. He reviewed the study data, especially the hydrological data, assembled by the Corps, and prepared a report setting forth his conclusions and supporting reasons. A report on his findings and conclusions relative to the erosion matter in issue was in evidence. The totality of the testimony and the report of Simons supports the conclusion that the erosion on the plaintiffs' banks was not directly caused by or significantly related to the construction and operation of the high-lift dams in issue.[16]

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[16]Simons agreed with Lowell that some 99.5 percent of erosion that occurs on riverbanks results from high water or flood conditions. He also observed that when the flow of the Ohio River reached 325,000 cubic feet per second (cfs), reflecting flood conditions,

the high-lift dams on the Ohio River exercised no control over river flow or its velocity (see text at page 11, *supra*). As to the protection offered by sandbars and armoring to erosion from waves, Simons observed that sandbars were transient things which were created by river action and changed and removed by river action. He viewed sandbars, armoring, etc., as inadequate protective devices against river erosion during periods of floods since the high waters with attendant high velocities operate against the high banks above these sandbars and armored sites.

Schumm obtained a Ph.D. in geomorphology from Columbia University in 1955, with emphasis on drainage and erosion patterns and problems. He worked for the United States Geological Survey for 12 years, dealing most of the time with erosional problems in the western United States. Since 1967, Schumm has served as a professor of Geology at Colorado State University, in its Department of Earth

Resources, where he spends half his time teaching and the other half in research work. In the course of his professional work, Schumm had studied a number of rivers, e.g., the Mississippi, Arkansas, Platte, Yellow and Cimarron rivers. He was eminently qualified to offer expert opinions on river matters, especially erosion.

Schumm visited the riverbank sites of all the plaintiffs except Tolliver and Skelton, and, as to those two sites, he did look at riverbanks generally in the areas where those two properties were located. He also spent 4 days in making a general reconnaissance of the Cannelton and Meldahl pools by boat, and another day in making a reconnaissance over the river by helicopter. In these reconnaissance efforts, which gave Schumm a broad overview of general river conditions, Schumm noted that while some banks in these pools were eroding, other banks, that had suffered from past erosion, were healing and stabilizing by vegetation regrowth and sediment deposition,

and still other banks were completely stable. He noted that erosion within the pools was varied, i.e., it was not confined to any specific area. He observed that erosion similar to that taking place on plaintiffs' banks was also taking place in those areas of the Cannelton pool where the water had not been raised at all and in those areas of the Meldahl pool where the water rise was only 2 feet. He further observed that most of the erosion on plaintiffs' banks was taking place at elevations significantly above the normal level of the pools, i.e., some distance away from the land-water interface at normal pool. During his investigations of the pools in question, Schumm saw no significant evidence of the riverbanks of plaintiffs. Schumm prepared a report containing his findings and conclusions on the erosion matter in issue.

Schumm discussed each of the plaintiffs' properties in issue, including the Tolliver and Skelton sites which he did not personally visit but which were in areas which he did

view and observe. He agreed with the other experts that most of the bank erosion on rivers, including the Ohio River, takes place during periods of floods when the velocity of flow is highest. He also reviewed the mass of data assembled by the Corps' investigative study, including the soils and hydrological data, as well as other pertinent data in the record. Schumm concluded, after his study of the matter, that there was no direct and significant relationship between the raising of water levels of the Cannelton and Meldahl pools and the erosion taken place on the properties of plaintiffs. He also gave his opinion of the most probable causes of the erosion taking place on plaintiffs' banks. In general, he corroborated Hagerty's views as to the most probable causes of the erosion taking place at those sites. Schumm's opinions and conclusions are entitled to considerable weight.

While there are many areas of conflict and dispute in the record, all the experts in these cases agreed on one significant fact,

i.e., that over 90 percent of the erosion that occurs on rivers and streams is due to flood conditions. Since it has been accepted herein that the high-lift dams do not increase the frequency, duration or peaks of the floods on the Ohio River, it follows that the erosion on plaintiffs' banks most probably would have occurred absent the construction and operation of the high-lift dams. *United States v. Sponenbarger*, 308 U.S. 256, 266 (1939); *Yazel v. United States*, *supra*, 118 Ct. Cl. at 71 and 73;[17] see *Coates v. United*

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[17]There are significant parallels between the *Yazel* case and the instant litigations. The circumstances in both litigations involve the construction of governmental structures on an alluvial river, one of the characteristics of which is erosion of its banks, which is subject to annual floods. The court in *Yazel* noted that the banks of such a river, even if stable for many years may, after prolonged exposure and saturation due to flood

conditions, suddenly collapse. The court in *Yazel* also noted that a survey of the involved Kansas River in 1940 indicated that 40 of the 160 miles of said river were active in various degrees of erosion (118 Ct. Cl. at 69). These observations have pertinent applicability to the instant litigation. The court in *Yazel* was not impressed with the contention of plaintiffs therein that their banks were stable before the structure (a levee) was built so the erosion that occurred on their banks afterwards must have been due to the construction of the structure (118 Ct. Cl. at 70-71). In both litigations it was shown that floods were the primary cause of the erosion (118 Ct. Cl. at 71-73). In both litigations it was not satisfactorily established that the accused structures increased the frequency, duration or peaks of floods (118 Ct. Cl. at 71). The denial of the erosion claims in the *Yazel* case supports the denial of the erosion claims in this litigation.

States, supra, 124 Ct. Cl. at 812.

As noted earlier, plaintiffs have the burden of proving, by a preponderance of the evidence, that the construction and operation of the navigation dams in issue were the direct and proximate cause of the erosion damages suffered by them on their riparian banks. *United States ex rel.* T.V.A. v 137 *Acres of Land, supra.* Plaintiffs, on this record, have failed to carry their burden in this regard. Their erosion claims must be denied.

III.

Plaintiffs contend that in the acquisition of flowage easements in connection with the Meldahl and Cannelton Dam projects, the Corps was guilty of fraud and misrepresentation.[18] Plaintiffs use the terms "fraud" and

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[18]As noted previously, a flowage easement was not acquired from plaintiff Dickenson whose property was located in the Newburgh Dam pool. As a result, there is no basis for a claim

of fraud and misrepresentation against the Corps on the part of Dickenson.

"misrepresentation" most loosely and in a very generalized manner in attacking various actions of the Corps which were pursued in the Corps' flowage easement acquisition programs. In their proposed findings of fact, plaintiffs set forth a barrage of charges against the Corps which they proffer as proof of fraud and misrepresentation. Each these charges has been covered, and found lacking in merit, in the findings of fact which accompany this opinion.[19] Accordingly, this

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[19]For example, there was nothing improper with the Corps advising riparian landowners affected by the projects of the government's right of condemnation in connection with flowage easement acquisitions. *Beatty v. United States*, 144 Ct. Cl. 203, 205-07, 168 F. Supp. 204, 206 (1958). Further, with respect to the applicability of state law relative to

the preparation, execution and recordation of the flowage easements in issue, it is sufficient to note the federal law, not state law, controls. *Kohl v. United States*, 91 U.S. 367, 374 (1875). See *United States v. Haddon*, 550 F.2d 677, 682 (1st Cir. 1977); see also *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). Finally, with respect to plaintiffs' constant reference to federal assistance programs covering federal, state and local riparian landowners to protect against bank erosion by riprap and other measures, it is worth nothing the observation of the Supreme Court in *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945) that "[i]f damages from any other cause [than a taking] are to be absorbed by the public they must be assumed by act of Congress and may not be awarded by the courts."

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opinion will discuss only those specific contentions of fraud and misrepresentation which plaintiffs deemed important enough to highlight

in their briefs.

With reference to the acquisition of flowage easements, which underscores plaintiffs' claims of fraud and misrepresentation, it is necessary to separate plaintiffs into three categories. In the first category are those plaintiffs who, after successful negotiations, conveyed flowage easements to the Corps by warranty deed;[20] in the

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[20]Plaintiffs Bynon, Cox, Cunningham, J. McGehee and E. McGehee. Since Cunningham did not testify, there is, in any event, no basis herein for a claim of fraud and misrepresentation against the Corps as to the acquisition of a flowage easements on his property.

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second category are those plaintiffs from whom, after unsuccessful negotiations, flowage easements were acquired by district court judgments on declarations of taking;[21]

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[21]Plaintiffs Loesch, Glenn (Tract 2218 E and

2410 E), Poston, Purcell, Schwab and Skelton. Since Poston and Skelton did not testify, there is, in any event, no basis for a claim of fraud and misrepresentation against the Corps as to the acquisition of flowage easements on their properties. There is no contention here that the district courts lacked jurisdiction or that their judgments on these matters are invalid. See *Evers v. Watson*, 156 U.S. 527, 531 (1895). The record herein will not support any charge of fraud sufficient to set aside these judgments. See *Evers v. Watson, Supra*, 156 U.S. at 533-34. Under such circumstances *res judicata* would seem to bar these plaintiffs from relitigating herein matters subsumed in the district court judgments. See *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Oglethorpe Co. v. United States*, 214 Ct. Cl. 551, 557, 558 F2d 590, 594 (1977). *Cf. Vanada v. United States*, 202 Ct. Cl. 1121, 1122-23 (1973). Unfortunately, the parties did not address this *res judicata* point in any helpful manner

in their briefs.

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and in the third category are those plaintiffs who obtained the properties in issue after the flowage easements in issue were acquired by the Corps.[22]

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[22]Plaintiffs Chouinard, Eaton-Williams, Glenn (Tract 2215 E), Griffith, Leatherbury, McNelly, E. Rice, C. Rice, Tolliver, Wagner, and Wood. Since the Corps had no dealings with these plaintiffs in the acquisition of the flowage easements in issue, there is no basis for any claim of fraud and misrepresentation against the Corps on the part of these plaintiffs. Further, the record is devoid of any reliable evidence as to fraud and misrepresentation relative to the acquisition of flowage easements on these properties. Finally, since these plaintiffs did not own the properties in question at the time the flowage easements thereon were acquired by the Corps, they are not the persons entitled

to compensation if, in fact, additional compensation is due relative to said flowage easement acquisitions. *United States v. Dow*, 357 U.S. 17, 20 (1958); *Lacey v. United States*, 219 Ct. Cl. 551, 560, 595 F.2d 614, 619 (1979).

Fraud has been defined as conscious wrongdoing with an intention to cheat or be dishonest. *United States v. Wunderlich*, 342, U.S. 98, 100 (1951). It is important to note that there is a presumption that public officials, i.e. Corps personnel, perform their duties in a proper manner. *Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 746, 572 F.2d 786, 805 (1978). A charge of fraud must be substantiated by clear and convincing proof rebutting every presumption of honesty and fair dealing. *DuBois Constr. Corp. v. United States*, 120 Ct. Cl. 139, 175, 98 F. Supp. 590, 597 (1951). The degree of proof necessary to establish fraud demands more than a preponderance of the evidence, it demands "clear

and convincing" evidence. *Hageny v. United States*, 215 Ct. Cl. 412, 428, 570 F.2d 924, 933 (1978). Further, fraud will not be presumed, and it must rest on something more substantial than suspicion, speculation, or a hint of fraud. *Hageny v. United States, supra*, 215 Ct. Cl. at 436, 570 F.2d at 937. There is no reliable evidence in this record which would support a charge that the Corps, in acquiring flowage easements from plaintiffs engaged in conscious wrongdoing with an intent to cheat or be dishonest with them. Such evidence that is present in the record reflects an honest effort by the Corps to be fair and forthright with all riparian landowners, including plaintiffs, in all matters relating to the dam projects. *Cf. Kirkendall v. United States*, 90 Ct. Cl. 606, 614, 31 F. Supp. 766, 770 (1940). Plaintiffs have failed to carry the heavy evidentiary burden placed upon them relative to the fraud charges they have raised in this litigation. See *Law v. United States*, 195 Ct. Cl. 370, 440-53

(1971); *Eastern School v. United States*, 180 Ct. Cl. 767, 694-98, 381 F.2d 421, 431-34 (1967).

It would appear that the misrepresentation plaintiffs deem actionable herein consists of allegations that the Corps knowingly made false representations to plaintiffs in order to induce plaintiffs, in reliance on said false representations, to enter into flowage easement agreements or to otherwise accept the flowage easements without protest or without seeking additional compensation to their detriment and damage. See *LaCrosse Garment Mfg. Co. v. United States*, 193 Ct. Cl. 168, 175, 432 F.2d 1377, 1381-82 (1970).

While not clearly spelled out in their briefs, plaintiffs ostensibly contend that the Corps represented that the high-lift dams, especially the Cannelton Dam, would eliminate erosion problems;[23] that the Corps knew, or

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[23]Corps personnel did advise plaintiffs that raising the water level on the banks would

tend to stabilize the banks up to the water level because of the weight of the water against the banks, a view supported by the experts who testified in this litigation. Plaintiffs were also advised that the high-lift dams would reduce, at normal pool levels, the velocity of flow in the river, a view also supported by the experts in this litigation. Corps personnel made no representations that erosion would be eliminated as a result of the construction of the high-lift dams. There were absolutely no statements by Corps personnel that the high-lift dams would reduce the frequency, duration or peaks of floods on the Ohio River, and plaintiffs do not aver that any were made, and these matters are the crucial determinative factors in these cases, as was noted previously in this opinion.

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should have known, that erosion would occur as a result of construction of the high-lift dams because of experience it had with the low-lift dams;[24] and that plaintiffs relied on the

the flowage easement agreements.[25] The facts

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[25]The record supports the view that plaintiffs did not rely in any significant manner on any statements about erosion by Corps personnel relative to acquisition by the Corps of flowage easement. This is certainly true with respect to those plaintiffs from whom flowage easements were obtained by condemnation (see note 21, *supra*) or those plaintiffs who acquired properties after the flowage easements were obtained (see note 22, *supra*), some flatly testified they did not believe anything Corps personnel said relative to the problem of erosion.

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of record will not support these contentions.

The record indicates that there were discussions between the Corps and some of the plaintiffs relative to the problem of erosion. As might be expected, there is conflict in the recollections of the witnesses on both sides as to what was said on the matter. The

or which riverbanks would erode and which would not erode. The circumstances in these cases do not fit into the mold of those government contract cases cited by plaintiffs, e.g., *Helene Curtis Indus., Inc. v. United States*, 160 Ct. Cl. 437, 443-45, 312 F.2d 774, 778-79 (1963), which hold that where the government possesses special knowledge, not known to a contractor, which is vital to performance of the contract, the government has an affirmative duty to disclose such knowledge to the contractor. Interestingly, there was testimony from some of the plaintiffs that they expected erosion to occur as a result of the dam projects. Under these circumstances, the cases relied on by plaintiffs' work against them. See *Helen Curtis Indus., Inc. v. United States, supra*, 160 Ct. Cl. at 446, 312 F.2d at 779; see also, *L. M. Jones Co. V. United States*, 178 Ct. Cl. 636, 653-54 (1967).

Corps' representations in entering into

The record does not indicate the Corps had any problems with the low-lift dams, particularly with respect to riverbank erosion. The testimony of Corps personnel does not show that they anticipated, or should have anticipated, erosion problems because of the construction of the high-lift dams. The record indicates that erosion on rivers and streams is most unpredictable, a fact confirmed by the testimony of the experts. This unpredictability certainly weakens plaintiffs' contentions as to what the Corps knew or should have known as to erosion on any particular piece of property. Hooper, one of the Corps' negotiators with landowners in the flowage easement acquisition program, testified that when erosion questions were raised by landowners he advised them that he did not know whether there would be erosion in the future, and that he did not know whether present erosion would continue and/or increase. The Corps had no special knowledge as to when floods would occur in the future, or

record suggests that any discussions by Corps personnel with plaintiffs on the matter of erosion manifested at best expressions of opinion or expectation given in circumstances which must have identified them as such, rather than flat representations of fact. Such discussions will not support a claim for misrepresentation. See *Aerojet-General Corp. v. United States*, 199 Ct. Cl. 422, 432-33, 467 F.2d 1293, 1299-1300 (1972); *Phillips Petroleum Co. v. Rau Constr. Co.*, 130 F.2d 499, 501 (8th Cir. 1942). Synthesizing the matter, the record supports the view that Corps personnel made no actionable representations that erosion problems would be eliminated or reduced by the construction of the high-lift dams.

a) Aerial Surveys

In their briefs, plaintiffs contend that the Corps utilized aerial surveys which, they seem to say, produced data that was inaccurate and unreliable. Plaintiffs seem to imply that the Corps deliberately used aerial surveys

knowing that such a procedure would produce results which would enable the Corps to pay less for more flowage easement land by means of inaccurate descriptions of said easements. Plaintiffs do not say whether these allegations are grounded on a claim of fraud or on a claim of misrepresentation. There is no evidence in the record which will support such allegations.

In obtaining information for the preparation of flowage easement documents, the Corps relied, *inter alia*, on aerial surveys of the riverbank areas of the Cannelton pool by a reputable and experienced firm. By a process called photogrammetry, photographic data from the aerial surveys was converted into maps with appropriate contour and elevation data. United States Geological Survey maps are prepared in this same manner. The accuracy of these maps conformed to that required by the National Standards of Map Accuracy. These maps were subsequently field checked for accuracy and any discovered errors were corrected

before the data was utilized by the Corps.

Plaintiffs challenge the use of these aerial surveys in preparing the legal descriptions describing the flowage easements taken on plaintiffs' properties. The essence of their complaint is that the accuracy of the photogrammetric process has not been authenticated at each step by appropriate individuals.[26] Plaintiffs, in my mind, have

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[26]Plaintiffs contend, for example, that in order for the aerial survey results to have any efficacy, the aerial photographer would have to certify as to the camera lens setting, the person plotting the elevations and establishing contours would have to certify as to their accuracy, etc. Since this was not done, plaintiffs seem to argue, the data obtained from the survey must be deemed unreliable, and therefore the flowage easement descriptions, which were based in some way on the aerial survey procedure, must be deemed inaccurate and unreliable. Plaintiffs'

described the various lands in which it intended to, and did, take flowage easements. See in this regard *United States v.* 21.54 *Acres of Land*, 491 F.2d 301, 305 (4th Cir. 1973).

b) Ordinary High Water Mark

Plaintiffs claim that the ordinary high-water mark determinations, reflected as m.s.l. elevation figures in each flowage easement document in issue, were erroneous and therefore entitles them to additional just compensation for resulting additional flowage easement takings (see note 3, *supra*).[27]

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[27]Obviously those plaintiffs who acquired the properties in issue after the flowage easements were acquired would not be entitled to additional compensation for any such additional takings in any even (see note 22 and text, *supra*). Further, those plaintiffs whose flowage easement takings resulted from district court judgments have not shown any reason why *res judicata* should not bar their

claims (see note 21 and text, *supra*). The district courts have jurisdiction to determine any such OHWM dispute. See *United States v.* 21.54 *Acres of Land*, 491 F.2nd 301, 306-07 (4th Cir. 1973); *Vanada v. United States*, 202 Ct. Cl. 1121, 1122 (1973).

There is no reliable evidence in the record that the Corps' OHWM determinations as to each property in issue were erroneous. Plaintiffs have failed to carry their burden in this regard and their erroneous OHWM contentions are accordingly rejected. See *United States v.* 329.05 *Acres of Land, supra; United States ex rel.* T.V.A. v. 137 *Acres of Land, supra.*

While not clear in their briefs and findings, plaintiffs ostensibly feel that the use of an erroneous OHWM by the Corps in these flowage easements was known, or should have been known, to the Corps at the time they were acquired, and thus constituted fraud and/or misrepresentation on the part of

the Corps in obtaining easements from them under such circumstances.[28] There is

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[28]Plaintiffs in their briefs argue that, in any event, a mutual mistake of fact exists as to the correct OHWM and therefore the court should reform each flowage easement document to reflect said correct OHWM, citing *Higgs v. United States*, 212 Ct. Cl. 146, 150, 546, F.2d 373, 376 (1976), where reformation was allowed to correct clerical misdescriptions of property in a contract. Plaintiffs do not offer any correct OHWM determinations. More importantly, there is no mutual mistake of fact on which the court could predicate any such action in any event. Defendant and the Corps maintain that the OHWM determinations in issue are correct. There is no reliable evidence in this record that the Corps' OHWM determinations are incorrect. It must be concluded that there was no mistake by the government and thus no mutual mistake and, accordingly, no basis for

contention might have had some merit had the validity of the legal descriptions of the flowage easements been challenged by the results of an actual survey by a competent surveyor. This is the thrust of *Roads v. Virginia-Florida Corp.*, 476 F.2d 82, 84 (1973) relied on by plaintiffs. As this record now stands, there is no reliable and persuasive evidence that the flowage easement descriptions in issue are inaccurate or otherwise unreliable.

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raised an immaterial issue. The question, regardless of how it was done, is whether the descriptions set forth in the acquisition documents accurately reflected and described the flowage easements taken from plaintiffs. The only reasonable answer that can be drawn from this record is an affirmative one. Plaintiffs have failed to prove that the flowage easement descriptions as to each property in issue were erroneous. It is found, instead, that the Corps has, in fact, accurately

tract below the Corps' OHWM determination because the evidence showed this portion of land to have been farmed, and crops harvested for profit, over the course of at least 23 years. Applying the agricultural value test, citing, *inter alia*, *Borough of Ford City v. United States*, 345 F.2d 645 (3d Cir. 1965), *cert. denied*, 382 U.S. 902, the trial judge concluded that this farmed portion of the tract must be deemed to be above the OHWM. Subsequent to the rendition of the trial judge's recommended decision and conclusion of law, the parties in *Vanada* settled the case. See 206 Ct. Cl. 819. Accordingly, there was no decision on the merits as to this OHWM issue, and the trial judge's recommended decision is not a judgment of the court under these circumstances. See *Pitcairn v. United States*, 212 Ct. Cl. 168, 195-96, 547 F.2d 1106, 1123-24 (1976). There is no reliable evidence in the record that the Corps' OHWM determinations on any of the properties in issue embraced lands

reformation. See *Fraass Surgical Mfg. Co. v. United States*, 215 Ct. Cl. 820, 825-29, 571 F.2d 34 (1978).

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absolutely no evidence in the record to support these feelings, beliefs or allegations.

In their briefs, plaintiffs content that the OHWM on the entire Ohio River is patently defective. Plaintiffs cite three cases in which, they say, courts have concluded that OHWM determinations by the Corps in certain Ohio River pool areas were defective. The cited cases are *Tri-State Materials Corp. v. United States*, 213 Ct. Cl. 1,550 F.2d 1 (1977) (Racine Locks and Dam); *United States v.* 21.54 *Acres of Land, supra,* (Hannibal Locks and Dam); and *Vanada v. United States, supra,* (Newburgh Locks and Dam).[29] A reading of the first two

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[29]In *Vanada*, a trial judge of this court did find that as to one tract of land in the Newburgh pool the Corps' OHWM determination was erroneous as to a portion of land on said

the statute of limitations bars any claim those plaintiffs may have for additional compensation emanating from said easements relating to the OHWM. This same defense would seem to have equal applicability to the claims of the other two categories of plaintiffs as well. The flowage easements in issue were all acquired by the Corps on or before September 5, 1967. The earliest petition in these cases was filed on July 16, 1975, more than 6 years after the acquisition of these flowage easements. Accordingly, 28 U.S.C. § 2501, without more, bars consideration of these OHWM claims. Plaintiffs' suggestion that the statute of limitations is not applicable to fifth amendment taking claims is clearly without merit. See *Soriano v. United States*, 352 U.S. 270 (1957); *Nadler Foundry & Mach. Co. v. United States*, 143 Ct. Cl. 92, 95-96, 164 F. Supp. 249, 251-52 (1958).[30]

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[30]Defendant does not raise the defense of

that were farmed and/or cropped below said OHWM determinations. On this record, plaintiffs, in any event, would not meet the test utilized by the trial judge in his *Vanada* recommended opinion.

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cases discloses that the courts in those two cases did not find that the OHWM determinations of the Corps in those pool areas were erroneous or incorrect. Indeed, there were no determinative decisions involving the correctness of the OHWM in those two cases. The third cited case, as indicated in note 29, *supra*, has no precedential value, and even if it did, plaintiffs would not, on this record, fall within the pale of its holding. No case has been cited, and none has been found, where a court has concluded that the Corps' OHWM determinations on the entire Ohio River are patently defective.

As to that category of plaintiffs who entered into flowage easement warranty deed agreements with the Corps, it appears that

limitations as to the erosion claims advanced by plaintiffs. It has been held in one case that a taking occurs when a dam was completed and put in operation by the filling of the pool. See *County Court of Marion County W. Va. v. United States*, 53 Ct. Cl. 120, 150 (1918); but see *Untied States v. Dickenson*, 331 U.S. 745, 745-49 (1947). In the Cannelton pool area, the pool rise was completed on August 17, 1972. The plaintiffs in this pool area claimed they began to notice erosion on their banks in 1972 or thereabouts. Since the petitions involving Cannelton pool plaintiffs were filed within 6 years of August 17, 1972, there is no question but that their erosion claims are timely. However, when the erosion claims of the Meldahl pool plaintiffs accrued are not as easily determined on this record. The Meldahl pool rise was completed on March 28, 1965. Unlike the Cannelton pool plaintiffs, some Meldahl pool plaintiffs testified generally that they did not notice any erosion manifestations until

1972 or thereabouts even though the water level had been raised some 7 years previously. One Meldahl pool plaintiff testified he first noticed erosion incidents in 1967. Because a number of Meldahl pool plaintiffs did not testify or acquire their property after the dam was operational, it is difficult to draw conclusions as to when erosion manifested itself on the banks sufficient to start the running of the limitations period. Under such circumstances, and since defendant does not raise limitations as a defense to the erosion claims, limitations will not be deemed to apply to the claims of the Meldahl pool plaintiffs although the question is a sticky one.

The OHWM determinations in issue were plainly stated in the flowage easement documents. They were not concealed from plaintiffs. Further, the OHWM on a riverbank is a physical fact, subject to determination by inspection of the riverbank. *Kelley's Creek*

& N.W.R.R. Co. v. United States, 100 Ct. Cl. 396, 405-06 (1944). It is not unreasonable to expect that plaintiffs, as riparian landowners, were familiar to some degree with their riverbanks. Given the Corps' OHWM determinations, plaintiffs had all the information necessary and available to them to contest these determinations at the time the flowage easements were obtained from them. See *Hart v. United States*, 585 F.2d 1280, 1283 (5th Cir. 1978). It is difficult under such circumstances to accept plaintiffs' views that they were deceived or misled by the Corps' OHWM determinations. See *Butler v. United States*, 213 Ct. Cl. 379, 386, 551 F.2d 286, 290 (1977). It is to be noted that other riparian landowners on the Ohio River, from whom the Corps acquired flowage easements in connection with its high-lift dam modernization program, challenged the Corps' OHWM determinations in a timely manner when they believed them to be incorrect. See *United States v.* 21.54 *Acres of Land*,

supra, 491 F.2d at 303 (Hannibal Locks and Dam); *Vanada v. United States*, 202 Ct. Cl. 1121 (1973); and 206 Ct. Cl. 819 (1975) (Newburgh Locks and Dam). Plaintiffs could have, and should have, done so before the limitations period ran on them. Accordingly, since their OHWM causes of action accrued at dates more than 6 years prior to their instituting suits in this court, these claims are time barred. Plaintiffs have offered no acceptable reasons why the running of the statute of limitations should be suspended or not applied in these cases. See *Braude v. United States*, 218 Ct. Cl. 270, 273-74, 277-78, 585 F.2d 1049, 1051-52, 1053-54 (1978); *Japanese War Notes Claimants Ass'n. v. United States*, 178 Ct. Cl. 630 634-36, 373 F.2d 356, 358-60 (1967). The passage of time, the raising of the pools and the effects of floods, etc., have undoubtedly changed the riverbanks in issue such that today one would be unable to inspect these riverbanks and determine where in 1965 or before (Meldahl pool), or

1972 and before (Cannelton pool) the OHWM was. The statute of limitations was designed to cover just such situations.

In summary, after careful consideration of the voluminous trial record in these cases and giving due regard to the proposed findings of fact and briefs of the parties, it is concluded that plaintiffs are not entitled to a favorable liability determination relative to their allegations that the Corps was guilty of fraud and misrepresentation in obtaining flowage easements on the properties in issue.

IN THE UNITED STATES COURT OF CLAIMS

AVABELLE BASKETT, ET AL. No. 161-78

vs.

THE UNITED STATES

Clerk's Office

Washington, D. C. July 27, 1981

To Attorney of Record, Assistant Attorney General, and Trial Judge Lydon:

Please take notice that in the above cause there has been entered this day on the plaintifs' motion, filed April 6,1981, for judicial notice, the following order: by Trial Judge DENIED. At this stage of the proceedings, this is an evidentiary matter that is better covered in pretrial proceedings and/or at trial.

Very truly yours,

Frank T. Peartree
Clerk, Court of Claims

APPENDIX "D"

IN THE UNITED STATES COURT OF CLAIMS

TRIAL DIVISION

(Filed: August 3, 1981)

AVABELLE BASKETT, et al.) NOS.161-78, 340-78, 317-79L, 311-80L, and 616-80L

v.

THE UNITED STATES

STANDARD PRETRIAL ORDER ON LIABILITY (RULE 111)

IT IS ORDERED as follows:

1. Plaintiff's Submission. On or before October 2, 1981, the plaintiff* shall furnish the following to the attorney of record for the defendant and to the trial judge:

(a) A list accurately describing the documents, including report(s) of experts, that are relied on and are to be offered in evidence. The documents shall be numbered; and the list shall be accompanied by a copy of each document referred to therein, except that (1) no copy need

be supplied to defendant's counsel where the plaintiff reasonably believes that the defendant already has the original or a copy, and (2) the trial judge need not be provided a copy of any exhibit unless its admissibility is put in issue.

(b) A statement of the material matters of fact as to which it is believed that there is no substantial controversy between the parties, or which have been agreed to by the parties. The paragraphs of this statement shall be numbered.

(c) A memorandum of contentions of fact and law, which shall comply with the following requirements;

(1) The contentions of fact shall consist of a concise statement of the ultimate, material facts which the plaintiff expects to establish, rather than a general statement of the claim or a repetition of the pleadings.

(2) The contentions of law shall be

in the form of conclusions of law based on the ultimate facts which the plaintiff expects to establish, and, in addition, shall contain a brief statement of the points of law and a citation of the authorities relied upon in support of each point.

(d) (1) A list setting forth the name, address, and occupation of each of the witnesses whom the plaintiff proposes to call, and a succinct statement of the issue or issues to which the testimony of each witness will relate.

(2) The preferred date for the beginning of the trial, and the preferred place or places therefor.

(3) An approximation of the time that will be required for the direct examination of the plaintiff's witnesses at each place.

2. Defendant's Response. Within 60 days after receiving the data referred to in

paragraph 1 of this order, the defendant shall furnish the following to the attorney of record for the plaintiff and to the trial judge.

(a) A statement admitting or denying the admissibility of each document listed under paragraph 1(a) of this order, together with the reasons for any denial of admissibility, and a further statement admitting or denying the genuineness of any documents the admissibility of which is disputed.

(b) A statement (arranged in numbered paragraphs) agreeing to, denying, revising or otherwise commenting on the factual data submitted under paragraph 1(b) of this order.

(c) A list of the proposed defense exhibits, meeting the requirements of paragraph 1(a) of this order.

(d) A statement setting out any further material matters of fact

as to which the defendant believes that there is no substantial controversy between the parties. The paragraphs of this statement shall be numbered.

(e) A memorandum of contentions of fact and law, which shall comply with the requirements set forth in paragraph 1(c) of this order.

(f) A list of the proposed defense witnesses, complying with the requirements of paragraph 1(d) (1) of this order.

(g) A statement indicating the defendant's preference as to the date and location of the trial.

(h) An estimate of the time likely to be required for the presentation of the direct testimony of the defendant's witnesses, and the cross-examination of the plaintiff's witnesses, at each preferred location.

3. Plaintiff's Reply. Within 30 days after receiving the data referred to in paragraph 2 of this order, the plaintiff shall furnish the following to the attorney of record for the defendant and to the trial judge:

(a) A statement agreeing to, denying, or otherwise commenting on any revised or additional factual data submitted under paragraph 2(b) and (d) of this order.

(b) Such observations in rebuttal as the plaintiff may wish to offer respecting the defendant's contentions
mitted under paragraph 2(e) of this order.

(c) A statement admitting or denying the admissibility of each of the documents listed under paragraph 2 (c) of this order , together with the reasons for any

denial of admissibility, and a further statement admitting or denying the genuineness of any documents the admissibility of which is disputed.

(d) An estimate of the time likely to be required for the cross-examination of defendant's proposed witnesses at each preferred location.

4. Form of Compliance. For convenience of reference, submissions in compliance with this order shall follow the format of the order by citing the numbered paragraph pursuant to which each portion of a particular submission has been prepared.

5. Sanctions. Rule 114 (b) provides sanctions for failure or refusal to comply with the requirements of this order. No document, including expert reports, will be accepted, except for the most compelling of reasons, as an exhibit at trial unless it has been listed as a proposed

exhibit in the parties' pretrial submission as required by this order. All proposed witnesses must be listed in the pretrial submission required by this order. If a witness, not listed in the pretrial order, is proposed, compelling reasons must exist to justify his or her testimony at trial. In such circumstances, the name(s) of such a witness(es) must be given the other side at least 10 days prior to the first day of trial, together with a brief summary of his or her proposed testimony. Failure to follow this procedure may result in a rejection of the testimony of said proposed witness(es) when he or she is proffered as a witness(es) at trial.

Thomas J. Lydon
Trial Judge

* The word "plaintiff", as used in this order, means "plaintiffs" in a

case where two or more persons have joined together in filing a petition.

RULE 13. AUTHORITY OF TRIAL JUDGES; TRIAL DIVISION

(a) General: The trial judges shall constitute the trial division of the court and shall have the power, to the extent authorized by statute and these rules, to do and perform any acts which may be necessary or proper for the efficient performance of their duties and the regulation of proceedings before them.

(b) Responsibility: In all cases referred to him, the trial judge shall be responsible in the first instance (1) for all orders requisite to the joinder of issue on the pleadings; (2) for the disposition of procedural motions; (3) for the direction and conduct of pretrial proceedings (including discovery and depositions); (4) for the trial of issues of fact; (5) for making findings of fact; and (6) unless otherwise directed by the court, or otherwise provided by these rules, for submitt-

ing his recommended decision.

(c) Discretion of Trial Judge: In the event that a question of authority not covered by a rule arises in proceedings before a trial judge, the trial judge shall exercise his discretion thereon, subject to review by the court in its discretion.

(d) Review by the Court: (1) Unless the rules provide otherwise, all rulings and orders by the trial judge shall be subject to review by the court on appeal or *sua sponte*. (Exercise of discretion by trial judge, paragraph (c) of this rule 13; procedural motions, Rule 53; recommended decisions, Rules 54, 141-47, and 166).

(2) With respect to any ruling or order by the trial judge (including any such ruling or order made pursuant to paragraph (c) of this rule) as to which no time is prescribed for filing a request for review by the court, the request shall be filed within

10 days after the service of such ruling or order, unless the court on motion and for good cause shown enlarges or shortens the time.

(e) Misconduct before Trial Judge: Any misconduct by attorneys, parties, witnesses, or other persons at any proceeding before a trial judge may be reported by him to the court for such disciplinary action, including contempt proceedings, as the court may deem proper under the circumstances.

COURT OF CLAIMS RULE 147 (b)

RULE 147. FINDINGS AND JUDGMENT BY THE COURT

(a) Findings: Judgment: In all actions tried on the facts, the court will find the facts and state separately its conclusion of law, and will enter an appropriate judgment. Except as to a party against whom a judgment is entered by default, every final judgment may grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(b) Trial Judge's Report: The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part,or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witness; and the find-

ings of fact made by the trial judge shall be presumed to be correct.

10/1/74

UNITED STATES CODE TITLE 28 USC §636 (b) (1) (C)

§ 636. Jurisdiction, powers, and temporary assignment.

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment -

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

APPENDIX I

(b)(1) Notwithstanding any provision of law to the contrary -

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant to supress evidence in a criminal case, to dismiss or to permit maintainance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also deignate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, or any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination

of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject,or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53 (b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such

additional duties as are not inconsistant with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce,

after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed, or upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the

facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the of the process of the district court or misconduct in the presence of a judge of that court.

(e) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily

assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635.

(f) A United States magistrate may perform the cerification function required by section 4107 of title 18, Untied States Code.A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of

of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

As amended Oct 17,1968, Pub.L.90-578, Title 1, § 101, 82 Stat. 1113; Mar.1, 1972, Pub. L. 92-239, § 1,2,86 Stat.47; Oct.21, 1976, Pub.L. 94-577, §1,90 stat.2729, Oct. 28, 1977, Pub. L. 95-144, §2, 91 Stat. 1220.

28 U.S.C. § 1651(a)

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

APPENDIX "J"

28 U.S.C. § 2503(b)

28§ 2502 PARTICULAR PROCEEDINGS

(a) Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such court's jurisdiction.

(b) See section 7422(f) of the Internal Revenue Code of 1954 for exception with respect to suits involving internal revenue taxes. As amended Nov. 2, 1966, Pub.L 89-713, § 3(b), 80 Stat. 1108.

§2503. Proceedings before commissioners generally.

(a) Parties to any suit in the Court of Claims may appear before a commissioner in person or by attorney, produce evidence and examine witnesses. In accordance with rules and orders of the court, commission-

ers shall fix times for trials, administer oaths or affirmations to and examine witnesses,receive evidence and report findings of fact and, when directed by the court, their recommendations for conclusions of law in cases assigned to them. Hearings shall, if convenient, be held in the counties where the witnesses reside.

(b) The rules of the court shall provide for the filing in court of the commissioner's report of facts and recommendations for conclusions of law, and for opportunity for the parties to file exceptions thereto, and a hearing thereon before the court within a reasonable time. This section shall not prevent the court from passing upon all questions and findings regardless of whether exceptions were taken before a commissioner. As amended Sept. 3, 1954, c.1263,§53, 68 Stat. 1246.

CONSTITUTION OF THE UNITED STATES

1787

ARTICLE.

1. The Congress.

3. Judicial Department.

PREAMBLE

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I

The Congress

§ 1. Legislative powers vested in congress. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 8. Powers of congress. [1] The congress

shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

[2] To borrow money on the credit of the United States;

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

[4] To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

[5] To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

[6] To provide for the punishment of counterfeiting the securities and current coin of the United States;

[7] To establish post-offices and post-roads;

[8] To promote the progress of science

and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

[9] To constitute tribunals inferior to the Supreme Court;

[10] To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

[11] To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

[12] To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

[13] To provide and maintain a navy;

[14] To make rules for the government and regulation of the land and naval forces;

[15] To provide for calling forth militia to execute the laws of the Union, suppress insurrections and repel invasions;

[16] To provide for organizing arming, and disciplining the militia, and for governing such part of them as may be employed

in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

[17] To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and

[18] To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

ARTICLE 3

Judicial Department

§ 1. Judicial power. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the Supreme Court and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

§ 2. Extent of judicial power--Supreme Court--Trial and places of trial. [1] The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to contro-

versies between two or more states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.